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July 14, 1993

Mr. William F. Caton
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

RE: MM Docket No. 92-265
Competition and Diversity in Video
Programming Distribution and Carriage

Dear Mr. Caton:

Transmitted herewith, on behalf of United States Satellite Broadcasting Company, Inc. ("USSB") are an original and eleven (11) copies of its "Opposition to Petition for Reconsideration of the National Rural Telecommunications Cooperative" in the above-referenced proceeding.

Should any questions arise concerning this matter, please communicate with this office.

Very truly yours,

FLETCHER, HEALD & HILDRETH

Patricia A. Mahoney

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Counsel for United States Satellite
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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-265
	)	
Development of Competition and Diversity in Video Programming Distribution and Carriage	)	

To: The Commission

OPPOSITION TO PETITION FOR RECONSIDERATION OF THE NATIONAL RURAL TELECOMMUNICATIONS COOPERATIVE

SUMMARY

Herein, United States Satellite Broadcasting Company, Inc. ("USSB"), opposes the Petition for Reconsideration of the National Rural Telecommunications Cooperative ("Petition"), in the above-referenced proceeding, filed on June 10, 1993, in which the National Rural Telecommunications Cooperative ("NRTC") requested reconsideration of the First Report and Order in this proceeding, FCC 93-178, 8 FCC Rcd 3359 (1993) (hereinafter "First R&O"). USSB opposes Section B of NRTC's Petition, in which NRTC contends that the Commission erred in restricting the application of new Section 628(c)(2)(C) of the Communications Act by limiting the regulations prohibiting exclusive program contracts to contracts to which a cable operator is a party. NRTC's Petition

does not address the language of new Section 76.1002(c)(2) of the rules, which also applies only to contracts to which a cable operator is a party.

As demonstrated herein, the rules adopted by the Commission in this proceeding pertaining to exclusive program contracts are entirely consistent with Section 628(c)(2)(C) of the Communications Act, its legislative history, the record in this proceeding, and the public interest. NRTC has not demonstrated any error in the First R&O or any need for reconsideration of the Commission's First R&O to expand the prohibition against exclusive program contracts beyond contracts to which a cable operator is a party.

As USSB demonstrates herein, the public interest in exclusivity in the sale of entertainment programming has been recognized by Congress and the Commission. Notwithstanding this recognition, certain exclusive program contracts were expressly prohibited by Congress in the Cable Act and by the Commission in this proceeding for very specific reasons that do not apply to multichannel video service providers other than cable. Contracts guaranteeing one multichannel video provider exclusivity of programming vis-a-vis its competitors within the same service and serving the same geographic area (which NRTC contends should be prohibited per se) are procompetitive, promote program diversity, and are the most efficient use of the spectrum. In the DBS service, such contracts are absolutely necessary for USSB, if

there is to be effective competition between the two DBS service providers and if DBS is to provide effective competition to cable.

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	)	
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To: The Commission

OPPOSITION TO PETITION FOR RECONSIDERATION OF THE NATIONAL RURAL TELECOMMUNICATIONS COOPERATIVE

United States Satellite Broadcasting Company, Inc. ("USSB"), by its attorneys, hereby respectfully submits its Opposition to the Petition for Reconsideration of the National Rural Telecommunications Cooperative ("Petition"), in the above-referenced proceeding:

I. Introduction

On June 10, 1993, the National Rural Telecommunications Cooperative ("NRTC") requested reconsideration of the First Report and Order that was released in the above-referenced proceeding on April 30, 1993, FCC 93-178, 8 FCC Rcd 3359 (1993) (hereinafter "First R&O").[1] USSB opposes Section B of NRTC's Petition, in which NRTC contends that the Commission erred in

[1]Eight other parties are seeking reconsideration of various

restricting the application of new Section 628(c)(2)(C) of the Communications Act by limiting the prohibited conduct in Section 76.1002(c)(1) of the new rules to the conduct of a "cable operator."[2] Curiously, NRTC's Petition does not address the language of new Section 76.1002(c)(2) of the rules, which also applies only to the conduct of a "cable operator." Moreover, the position that NRTC has advanced in its Petition is not one that NRTC advanced in its Comments or Reply Comments in this proceeding;[3] and the proposed alternative language that NRTC has advanced in its Petition as a substitute for Section 76.1002(c)(1) of the rules is not the same as the language originally proposed by NRTC in its Comments as a rule that should be adopted to implement Section 628(c)(2)(C).[4]

As demonstrated below, the rules adopted by the Commission in this proceeding pertaining to exclusive program contracts are entirely consistent with the statute pursuant to which they were

---

[2]USSB takes no position on other issues discussed in the NRTC Petition.

[3]See "Comments of the National Rural Telecommunications Cooperative and the Consumer Federation of America," filed January 25, 1993, and "Reply Comments of the National Rural Telecommunications Cooperative and the Consumer Federation of America," filed February 16, 1993, in MM Docket No. 92-265 (hereinafter "NRTC Comments" and "NRTC Reply Comments," respectively). In the NRTC Comments, NRTC took the position that

adopted, its legislative history, the record in this proceeding, and the public interest. NRTC has not demonstrated any error in the First R&O or any need for reconsideration of the Commission's First R&O in a way that would expand the prohibition against exclusive program contracts beyond contracts to which a cable operator is a party. As USSB demonstrates below, the public interest in exclusivity in the sale of entertainment programming has been recognized by Congress and the Commission. Notwithstanding this recognition, certain exclusive program contracts were expressly prohibited by Congress in the Cable Act and by the Commission in this proceeding for very specific reasons that do not apply to multichannel video service providers other than cable. As USSB discusses below, contracts guaranteeing one multichannel video provider exclusivity of programming vis-a-vis its competitors within the same service and serving the same geographic area are procompetitive, promote program diversity, and are the most efficient use of the spectrum. NRTC's proposal would, however, prohibit all such exclusive program contracts.

II. Preliminary Statement

USSB has been authorized to construct and launch a Direct Broadcast Satellite ("DBS") System. USSB has been assigned five transponders at 101° W.L., three transponders at 110° W.L., and eight transponders at 148° W.L. USSB plans to commence its DBS service with CONUS coverage from the 101° W.L. orbital location in March, 1994. USSB will offer 20 to 40 channels of programming

from its initial five transponders at 101°. The satellite at 101° W.L. is expected to be launched in December, 1993, and will be shared with Hughes Communications Galaxy, Inc. ("Hughes"), which has an authorization for the remaining eleven transponders (44 to 88 channels of programming) on the initial satellite. According to published reports, Hughes has entered into a lease or some other type of agreement with NRTC whereby NRTC has the right to market the programming on five of the Hughes transponders in certain specific geographic areas of the country.

Hughes is authorized to launch a second satellite for the 101° W.L. orbital location by June or July of 1994. By the end of 1994, Hughes should be operating 108 to 216 DBS channels; whereas, USSB will have 20 to 40 channels.

When high-power DBS service initially commences in 1994, it is anticipated that there will be a variety of programming arrangements. There may be advertiser-supported, subscription,

services that will be available on its DBS service, including contracts for the cable programming services of HBO, Cinemax, Showtime, The Movie Channel, FLIX, Comedy Central, MTV, VH-1, and Nickelodeon.[5] Programming has been acquired by USSB with varying degrees of exclusivity to USSB vis-a-vis other DBS providers.

USSB was one of the participants before Congress that supported the enactment of a program access provision within the Cable Television Consumer Protection and Competition Act of 1992 ("the Act" or "the Cable Act"). Pursuant to the Act, the Commission initiated MM Docket 92-265 to determine the rules and regulations that should be adopted with regard to program access and carriage. USSB participated in MM Docket No. 92-265 by timely filing Comments. USSB believes that the First R&O fairly reflects the record of this proceeding and is consistent with the intent and goals of Congress, as reflected in the legislative history of the Cable Act.

regarding the provision of programming in areas not served by a cable operator." NRTC Petition at iii. NRTC maintains that the Commission's new Section 76.1002(c)(1) of the rules, adopted in the First R&O, restricts the application of Section 628(c)(2)(C) to "cable operators" and that such a limitation is contrary to the intent of Congress. NRTC's Petition offers, for the first time, suggested language for Section 76.1002(c)(1) of the Commission's rules that would arguably prohibit the exclusivity that USSB has already successfully negotiated for its new DBS service. NRTC has not shown, however, that its suggested language and its interpretation of the Act are consistent with the Act, with the expressed intent of Congress, and with the public interest. NRTC has also failed to show any need for the further prohibitions that it proposes.

The Act itself is very clear and does not provide any support for NRTC's interpretation.[6] The only exclusive program contracts required to be prohibited under the Act are exclusive contracts to which a cable operator is a party where the area of distribution is one that is not served by cable. In fact, the Act's distinction between exclusive program contracts for areas

[6]It should be noted that the proposed antitrust consent decree in the pending Primestar Partners suit brought by 40 states against Primestar Partners, L.P. and 19 other defendants recognizes that high-power DBS providers at the 101° orbital position may enter into exclusive contracts with cable program

not served by a cable operator (Section 628(c)(2)(C)) and such contracts for areas served by a cable operator (Section 628(c)(2)(D)) only makes sense in the context of a restriction on contracts between cable operators and programming vendors.

Moreover, the legislative history of the Act is crystal clear that it is only contracts involving cable operators that are intended to be prohibited and restricted in Section 628(c)(2). NRTC offers no explanation whatsoever as to the manner in which it divined the intent of Congress concerning Section 628(c)(2)(C). Although it asserts that the Commission's new rule is contrary to the intent of Congress, NRTC's discussion of exclusive program contracts includes no reference or citation to any aspect of the legislative history of the Act.

In fact, the legislative history provides ample support for the Commission's interpretation of Section 19 of the Cable Act

> programming vendor affiliated with a cable operator."
>
> "With regard to areas served by cable operators, the FCC's regulations must prohibit exclusive contracts for satellite cable programming between a cable operator and a satellite cable programming vendor affiliated with a cable interest, unless the FCC determines such a contract is in the public interest."

Id. at 92 (emphasis added).

In concluding their consideration of Section 19 of the Act, the Conferees also warned that they expected the Commission "to address and resolve the problems of unreasonable cable industry practices, including restricting the availability of programming and charging discriminatory prices to non-cable technologies." Id. at 93 (emphasis added).

Moreover, it is apparent from the findings to which the conferees agreed that the concern of Congress in adopting Section 19 was over the power wielded by cable operators:

> "(5) The cable industry has become vertically integrated; cable operators and cable

threatening the development of new technologies and inhibiting the provision of service to the public. Thus, the only exclusive program contracts that were absolutely prohibited were those by which cable operators were agreeing with program vendors for exclusivity in areas not served by cable, i.e., areas which therefore would not receive any programming.

Moreover, the debate on the floor of the House of Representatives prior to the vote on the Tauzin amendment, which included most of the structure and text of Sections 628(c)(2)(C) and (D), vividly illustrates that the concern of the Congress in enacting these provisions was to stop cable operators from refusing to sell their product to competitors. In the words of Representative Tauzin:

> "The Tauzin amendment, very simply put, requires the cable monopoly to stop refusing to deal, to stop refusing to sell its products to other distributors of television programs."
>
> "In effect, this bill says to the cable industry, 'you have to stop what you have been doing, and that is killing off your competition by denying it products.'"

138 CONG. REC. 6533 (daily ed. July 23, 1992) (statement of Mr. Tauzin).

> "It is this simple. There are only five big cable integrated companies that control it all. My amendment says to those big five, 'you cannot refuse to deal anymore.'"

Id. at 6534.

> "There is an argument against our amendment someone made. The argument is that we no longer allow for exclusive type programs that

> are important to people who develop a product. Not so.... Our amendment says that exclusive programming that is not designed to kill the competition is still permitted."

Id. See generally id. at 6531-43.

It is also clear that even opponents of the Tauzin amendment viewed the restrictions on exclusive contracts as applying solely to cable operators--not to DBS operators and other multichannel video program providers:

> "The Tauzin amendment allows MMDS operators and DBS operators to enter into exclusive contract arrangements, and there is no reason why they should not be allowed to do so. Why is it then that cable programmers cannot enter into the same lawful exclusive contract arrangements as their competitors can for future programming investments. That is

to distributors of programming other than cable operators,[7] so that the American public has an alternative to cable:

> "We can give them choice. What do Americans want most in a free enterprise system? Two stores in town.... Two stores in town, that is what this debate is all about.
>
> With the Tauzin amendment we will create two stores in the television marketplace."

Id. at 6535 (statement of Mr. Tauzin). That the Commission was guided by Congressional intent is clear at paragraph 63 and notes 77-79 of the First R&O.

NRTC's interpretation of Section 628(c)(2)(C) and alternative proposed Section 76.1002(c)(1) are also inconsistent with the record in this proceeding and contrary to the public interest. Section 76.1002(c), as adopted in the First R&O, is supported by the record established in Docket 92-265. As the Commission noted in the First R&O, 8 FCC Rcd at 3378, the record in this proceeding revealed two key areas of concern for the competitors to cable: first, a number of multichannel video programming distributors (MVPDs) (which by definition includes DBS service providers) asserted that they had been unable to secure certain programming at all because programming vendors have exclusive contracts with cable operators, even in areas not currently served by cable; and second, even where MVPDs have been able to gain access to programming, they contend that they must

[7]The purpose of this section of the Act was to make programming accessible to other services, like DBS and MMDS. The Act does not guarantee that every MMDS operator and every DBS operator can obtain every program service.

pay unreasonably high prices for it. The limitations on exclusive contracting were adopted to address the first issue of concern. Id. The Attorneys General of Texas, Maryland, Ohio, and Pennsylvania also discussed this first concern in their "Comments of the Attorneys General of Texas, Maryland, Ohio, and Pennsylvania," filed in this proceeding on January 25, 1993 (hereinafter "States Comments"):

> "The granting of cable-only exclusives precludes competition and denies programming to subscribers and consumers. This practice has even extended to granting cable-only exclusives in areas where no cable exists. The 1992 Cable Act clearly prohibits the granting of cable-only exclusives in areas unserved by cable operators...."

been taken to protect exclusive rights." 8 FCC Rcd at 3384. Exclusive program contracts between cable operators and programming vendors were prohibited by Congress and the Commission because of the monopolistic and anticompetitive practices of the vertically integrated cable industry that kept other services from developing to compete with cable and kept programming from reaching consumers in areas that do not receive cable.

As noted above, the only exclusive program contracts that were flatly prohibited by the 1992 Cable Act (in Section 628(c)(2)(C)) were those that would result in no service being provided to the consumer. They were contracts between cable operators and programming vendors governing areas that were not served by cable. Under such cable-only exclusive arrangements, if the cable operator did not provide service to an area but was the exclusive distributor of such programming (and would not distribute its programming to other facilities-based competitors to cable), the consumer would not and could not receive the programming from any source[8] (and cable developed without any

---

[8]As the States Comments observed:

> "Since one of Congress' goals in passing the Cable Act is to promote the availability of programming, Congress has determined that conduct which makes a program totally unavailable to consumers in an area can never be in the public interest. 1992 Cable Act Section 628(c)(2)(C). No other interpretation is possible."

States Comments at 12.

effective competition). Such exclusive contracts existed for only one purpose--to kill the competition. There is no way such contracts can be considered to serve the public interest, and it is hardly surprising that they were declared to be per se prohibited.

Such a result cannot happen with DBS. With DBS, service will be provided at the outset to the contiguous 48 states by the satellite at the 101° orbital location. There will be no unserved areas that cannot obtain programming. Areas that already receive the same programming by cable or other multichannel video program providers will continue to be able to receive such programming from these sources and will have a choice between cable, MMDS, SMATV, C-Band satellites, and DBS (and any other video services that develop). They will have at least "two stores" (i.e., cable and DBS). Areas unserved by cable will be able to receive programs from two DBS services ("two stores") and any other service. The USSB and Hughes systems will be fully shared and compatible systems.

Moreover, the monopolistic power that cable has enjoyed, which led to the abuses that the Cable Act was designed to eliminate, cannot happen with DBS. In all but a few communities in the country, the cable operator holds a monopoly. It is the only cable service and often the only multichannel service available. With the initiation of DBS service in early 1994, the entire country will receive service from two DBS service providers (approximately 100 channels of programming at first,

with another 100 to follow later in the year). Unlike cable, no single DBS operator will be the sole provider of services within any given area. At the outset of DBS service, each DBS service provider will face active competition from the other multichannel DBS service, all cable services in areas that are served by cable, growing MMDS services, C-Band satellite services,[9] and future DBS service providers from satellites to be located at the other DBS orbital locations.

There is a fundamental distinction between what the Act prohibits--a cable operator refusing to make programming available to multichannel video services other than cable in areas where no cable service is available--and what NRTC proposes. The exclusivity rights for which USSB has already contracted only give USSB the exclusive right to deliver programming by DBS in areas which USSB will serve[10] and do not prevent programming vendors from entering into contracts to provide programs to any facilities-based competitor of cable other than DBS service providers. Yet NRTC's proposed regulation

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[9]In fact, a recent article in Broadcasting & Cable Magazine predicts that DBS may end up boosting C-Band satellite sales. See "DBS Also Seen As Boosting C-Band," 123 Broadcasting & Cable 58 (July 12, 1993).

[10]Under the Cable Act, and under Section 76.1002(c)(2), which NRTC does not challenge, an exclusive contract that gives a cable operator exclusive distribution rights within an area served by cable is not per se unlawful. Yet NRTC would have the Commission prohibit contracts that give other multichannel video distributors exclusive rights in areas they serve. Such a result was never intended by the Congress.

would arguably prohibit even USSB's exclusive programming arrangements.

In the absence of any real or perceived harm, there is no reason to expand Section 76.1002(c) in any way that would prohibit programming contracts that give an MVPD service provider other than a cable operator an exclusive distribution right within its own service.[11]

IV. Exclusive Program Contracts Between Programming Vendors and MVPDs other than Cable Operators Serve the Public Interest

As the Commission noted in its First R&O, the focus of the 1992 Cable Act is on assuring that facilities-based competition develops. First R&O, 8 FCC Rcd at 3384. As the Conference Report on the Act explained, "[t]he conferees intend that the Commission shall encourage arrangements which promote the development of new technologies providing facilities-based competition to cable...." H.R. CONF. REP. No. 102-862, supra, at 93.

Permitting a DBS service provider to enter into a contract for programming that is exclusive as against other DBS service providers fosters an arrangement that promotes the development of

890 F.2d 1173 (D.C. Cir. 1989). As discussed above, the Commission recognized in its First R&O that "the public interest in exclusivity in the sale of entertainment programming is widely recognized. Indeed, elsewhere in the 1992 Cable Act, in the context of the broadcast station-cable system relationship, specific steps have been taken to protect exclusive rights." 8 FCC Rcd at 3384.

Exclusive arrangements in DBS are clearly consistent with the Commission's goal of maximum lization of the spectrum and diversity of programming viewpoints. As Congressman Dingell explained in the debate over the Tauzin amendment, discussed above:

> "A lot has been said here today about exclusive distribution contracts. If this term is used in a pejorative fashion, it sounds most pernicious.
>
> But exclusive distribution contracts are a fact of life in the video distribution business, and have been for more than 40 years. They are not evil. The CBS Television Network has exclusive distribution contracts - with the more than 200 CBS affiliates around the country. Likewise with NBC, ABC, and Fox.
>
> Program syndicators enter into exclusive distribution contracts as well. Only one station per market can show programs like "Wheel of Fortune," or "Cosby" reruns, or any of the other shows that are syndicated.
>
> Sports leagues do it too. ABC has an exclusive arrangement with the NFL to show "Monday Night Football."
>
> Not only are exclusive distribution contracts a fact of life in the video marketplace. Exclusivity provides the

> mechanism to achieve diversity - an important policy goal that benefits the public. With access to more choices, the public has an increased opportunity to select what they want to see on television. Diversity helps to preserve our democracy, and is essential to enlightened self-governance."

138 CONG. REC. 6542 (daily ed., July 23, 1992) (statement of Mr. Dingell).[12]

Exclusive programming contracts in DBS also foster maximum utilization of the spectrum. The DBS satellite at 101° W.L. will be the first DBS satellite launched. There will be two DBS service providers offering service from that satellite (Hughes and USSB). Because of its far greater channel capacity, Hughes could completely duplicate all of the programming that USSB has arranged to acquire from HBO, Viacom, and others, if USSB were not permitted to negotiate and obtain the exclusive right to distribute such programs by DBS. It would be a terrible waste of the spectrum to mandate that both service providers must be able

[12]Congressman Dingell urged his colleagues to pass an amendment proposed by Congressman Manton rather than the amendment proposed by Congressman Tauzin. Mr. Dingell believed that the Tauzin amendment would lead to a veto that would not be overridden. See 138 CONG. REC. 6542.

to offer the same programming services.[13] The NRTC proposal would have that effect.

It should be noted that, with respect to DBS, the Commission's Rules do not regulate the number of channels that one DBS service provider can operate at a given location. It would have been possible, and consistent with the rules, for USSB (or Hughes) to operate the only DBS service at the 101° orbital location. If that had been the case, USSB (or Hughes) would have had de facto exclusivity for all of its programs and there would have been no violation of any rule and no harm to the public interest.

As it happens, fortunately for the American public, there will be two DBS service providers at the outset of this new service. If there is to be true competition between them and true diversity of programs available to the consumer, the Commission should not adopt regulations that will have the effect of requiring programming vendors to sell the same programming services to both DBS service providers. If the Commission wants both service providers to succeed and to provide effective

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[13]In its Report and Order in Potential Uses of Certain Orbital Allocations by Operators in the Direct Broadcast Satellite Service, 6 FCC Rcd 2581 (1991), the Commission noted that its allocation of spectrum for DBS, and its consistently flexible regulatory approach for DBS, are premised on the Commission's "conviction that DBS has a significant role in serving this nation's future telecommunications needs." Report and Order, 6 FCC Rcd at 2583. However, the Commission has warned that it can and will reconsider the spectrum allocation if demand is limited. By adopting a flexible regulatory approach for DBS, the FCC has recognized that over-regulation at the outset may inhibit development and growth of this incipient service.